92-1059

No. _____

Supreme Court, U.S.
FILED
OCT 20 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID LYLE BOESE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE P. MANNING
LAW OFFICES OF
LAWRENCE P.MANNING
444 Market Street
Suite 930
San Francisco, CA 94111
Counsel of Record
(415) 433-4500

October 19, 1992

QUESTIONS PRESENTED

I. WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROTECT PRETRIAL DETAINEES FROM CONDITIONS OF CONFINEMENT ON DEATH ROW THAT INFLICT PSYCHOLOGICAL PUNISHMENT?

II. WHETHER A REDUCTION IN THE TERM OF A SENTENCE IS AVAILABLE AS A REMEDY FOR VIOLATIONS OF THE FOURTEENTH AND EIGHTH AMENDMENTS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's holding that both the Eighth and Fourteenth Amendments only permit judicial scrutiny of conditions of confinement that concern adequate food, clothing, shelter, sanitation, medical care, and personal safety is arbitrary and unfair and conflicts with decisions of this Court and other circuits 7

II. The decision below that the Eighth and Fourteenth Amendments afford no remedy for a reduction in sentence where the government imposes punishment prior to conviction raises important and unresolved problems appropriate for decision by this Court 16

CONCLUSION 20

APPENDIX A (Memorandum Decision of Court of Appeals) 21

APPENDIX B (Judgment of District Court) . 29

TABLE OF AUTHORITIES

Page

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447, (1979) 6, 8, 9, 10, 13, 16, 19

Brown v. Comrs., 50 Miss., 468, ... 15

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.E.2d 677 (1986) 7

Estelle v. Ruiz, 679 F.2d 1115, (5th Cir. 1982) 10, 15

Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.E.2d 1435 (1960) 9

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.E.2d 859 (1976) 9

Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982) 14

Hurtado v. People of California, 110 U.S. 516, 4 S.Ct. 111, 28 L.E. 232 (1884) 15

Lareau v. Manson, 651 F.2d 96 (2nd Cir. 1981) 14

Lock v. Jenkins, 641 F.2d 488, (7th Cir. 1981) 14

Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 1435 (1981) 9

United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.E. 1252 (1946) 8

Wichita Council No. 120 of Security Ben. Ass'n v. Security Ben. Assn., 138 Kan. 841, 28 P.2d 976, (Sup.Ct. 1934) 19

Wilson v. Seiter, __ U.S. __, __, 111 S.Ct. 2321, 115 L.E.2d 271 (1991) 10, 13, 14, 15

Wolfish v. Levi, 573 F.2d 118, (2nd Cir. 1978) 13, 14

Wright v. Rushen, 642 F.2d 1129 1133 (9th Cir. 1981) 6, 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID LYLE BOESE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner David Lyle Boese respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 29, 1992.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit has not been reported, and is reprinted in the appendix hereto, p. 21 infra.

The judgment of the United States District Court was entered on defendant's plea of guilty. It is reprinted in the appendix hereto, p. 29 , infra.

JURISDICTION

Invoking federal jurisdiction under 18 U.S.C. §1952(a)(3) and 18 U.S.C. §1956 (a)(2)(B)(i) and Section 2, respondent brought this suit in the United States District Court for the District of Nevada.

The District Court entered judgment on petitioner's plea of guilty and pronounced sentence. No petition for rehearing was sought.

Invoking jurisdiction under, 18 U.S.C. §1291, petitioner sought review of the sentence on appeal to the United States Court of Appeals for the Ninth Circuit.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 29, 1992, affirming petitioner's sentence. No petition for rehearing was sought. This petition is filed within ninety days of that date and is therefore timely.

The jurisdiction of this Court to review the judgment and opinion of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States in Section 1, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to violations of 18 U.S.C. §1952 (a)(3) & 2, interstate travel in aid of racketeering and 18 U.S.C. §1956 (a)(2)(B)(i) and Section 2, money laundering. The District Court sentenced him under pre-guidelines rules to consecutive prison terms of three years for interstate travel and nineteen years for money laundering. The consecutive sentences run concurrently with an 18 year cocaine distribution sentence petitioner received in Texas. Petitioner received 1258 days of credit against his consecutive sentences for actual time served while awaiting judgment and sentencing.

Petitioner's pre-trial confinement lasted approximately three and one half years on "old death row" at Nevada State prison, Carson City, Nevada, a maximum security prison. The maximum security

unit he occupied housed death row inmates for the last few hours before their executions. Three executions were carried out during petitioner's pretrial incarceration, a fourth was stayed only four hours before the prisoner was to die and a fifth was stayed only days before the execution date.

On the evening before each execution, the condemned prisoners were held in a cell directly across from petitioner's. During this time, the condemned prisoners were permitted exclusive use of the day room, for the purpose of family visits and religious consultations. The day room contains the only recreational facilities in the unit. From his cell, petitioner viewed the emotional last visits of these families and directly experienced the anguish and fear these men suffered before their deaths. The only telephone on death row was in the day room and Counsel, on at least one occasion, could hear a condemned man praying in the background during discussions with petitioner.

During the executions, which were performed by lethal injection, all prisoners in the unit including petitioner were led past the death chamber itself and taken to "the hole", a solitary confinement unit. Shortly afterward, the prisoners were taken back up to death row. Each of them, by this time, was very much aware that the execution was over because the death chamber had been scrubbed down with formaldehyde and the fumes penetrated the entire area for several hours.

Petitioner's daily routine required that he pass by the death chamber, which contains an injection

table and restraints, at least six times each day. The unit houses primarily Mariel Cubans and petitioner, a caucasian, received repeated death threats because of his minority status causing him to constantly fear for his life and safety. The entire unit is designed to house dangerously violent prisoners and the Cubans, who are awaiting deportation, are its primary occupants. Violent attacks by these prisoners on each other or on the guards resulted in punitive action taken by prison authorities against all prisoners in the unit. No educational or employment programs were available.

Petitioner, fearing retaliation, made no complaint on his own behalf, although he was a member of a class of prisoners named in a lawsuit filed in federal District Court challenging the conditions. This complaint did not result in any modifications or changes in the conditions of petitioner's confinement.

Finally, petitioner sought redress for these grievances on direct appeal of the judgment and sentence to the United States Court of Appeals for the Ninth Circuit, claiming an entitlement to additional credit for the punitive detention he endured in violation of the Eighth and Fourteenth Amendments. The sentence was also challenged because it was disproportionate to the crimes involved.

Rejecting both claims, the Ninth Circuit affirmed the sentence by memorandum of opinion filed June 26, 1992. Two aspects of the memorandum decision affirming the sentence require emphasis:

While recognizing the precedent of this Court in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447, (1979) which held due process requires an adjudication of guilt before punishment and that detention becomes punishment if conditions are arbitrary or purposeless, the Ninth Circuit refused to apply this test to the conditions petitioner endured on death row. The Court of Appeals stated:

> Boese correctly observes that the eighth amendment requires that his conditions of incarceration comport with evolving standards of decency. (quoting, *Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981). Those standards focus, however, on "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Id. at 1132-33. (appendix A p. 26,27 infra).

The Court refused to consider whether the psychological trauma petitioner endured by being held in such close proximity to the executions was punishment in violation of the due process clause. The Court stated:

> We need not reach the question whether Boese's conditions of detention violated either the due process clause or the eighth amendment. Even if Boese's pretrial detention was punishment, the context within which he presses his argument requires its rejection. (appendix A p. 27 infra.)

The Court dismissed petitioner's eighth amendment and due process claims concerning safety and lack of space by concluding that prison officials did not willfully subject him to a risk of bodily harm. (quoting, *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L.E.2d 677, (1986) "section 1983 action requires more than mere negligence" (appendix A p. 27 infra.)

After applying standards appropriate for a §1983 action to petitioner's appeal of his sentence based on constitutional violations, the Ninth Circuit affirmed petitioner's sentence to consecutive terms of 3 and 19 years with credit for actual time served.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's holding that both the Eighth and Fourteenth Amendments only permit judicial scrutiny of conditions of confinement that concern adequate food, clothing, shelter, sanitation, medical care, and personal safety is arbitrary and unfair and conflicts with decisions of this Court and other Circuits.

In applying Eighth Amendment standards to conditions of pretrial detention the Ninth Circuit has, without congressional authorization, created an analysis which results in an arbitrary rule: infliction of cruel and unusual punishment is the only means by which prison officials can deprive pretrial detainees of

due process of law under the Fourteenth Amendment. The Ninth Circuit's analysis is an unprecedented departure from established Constitutional law doctrine that deserves this Court's attention.

The Ninth Circuit's analysis directly conflicts with this Court's decision in *Bell, supra*, 441 U.S., at 535, 99 S.Ct., at 1872, which held, under the due process clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.

The proper inquiry is whether the conditions or restrictions of pretrial detention amount to punishment of the detainee. Id., 441 U.S., at 535, 99 S.Ct., at 1872. The state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Id., 441 U.S., at 535, n.16, 99 S.Ct., at 1872, (quoting, *United States v. Lovett*, 328 U.S. 303, 317-318, 66 S.Ct. 1073, 1079-1080, 90 L.E. 1252 (1946).

Contrary to the view adhered to by the Ninth Circuit, this court has clearly distinguished standards of confinement which violate the Fourteenth Amendment from those failing to meet Eighth Amendment requirements.

In *Bell*, this court cited approvingly the Second Circuit's analysis establishing different standards for conditions of confinement under the Eighth and Fourteenth Amendments. The Second Circuit held that "an institution's obligation under the eighth amendment is at an end if it furnishes sentenced

prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Bell, supra*, 441 U.S., at 529, n.11, 99 S.Ct. 1869. These standards are commonly referred to as "core conditions". Accordingly, the "parameters of judicial intervention into conditions for sentenced prisoners are more restrictive than in the case of pre-trial detainees." *Bell, supra*, 441 U.S., at 529, 99 S.Ct., at 1869. This court granted certiorari in *Bell* to review only that portion of the Second Circuit's analysis which held prison officials must justify conditions of confinement for pretrial detainees by showing a compelling necessity. *Bell, supra*, 441 U.S., at 528, 99 S.Ct., at 1868.

Eighth Amendment analysis acknowledges that sentenced prisoners can be punished, although that punishment may not be "cruel and unusual" or, in other words, it may not involve the unnecessary and wanton infliction of pain. *Bell, supra,* 441 U.S., at 535. n. 16, 99 S.Ct., at 1872, *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2398, 69 L.Ed.2d 1435 (1981), (quoting *Gregg v. Georgia*, 428 U.S. 153, 171, 96 S.Ct. 2909, 2925, 49 L.E.2d 859 (1976) (joint opinion).

Conversely, to determine if conditions of pretrial detention amount to punishment a court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. *Bell, supra*, 441 U.S., at 538, 99 S.Ct., at 1873, quoting *Flemming v. Nestor*, 363 U.S. 603, 613-617, 80 S.Ct. 1367, 4 L.E.2d 1435 (1960).

If a restriction or condition is arbitrary or purposeless a court may permissibly infer that the purpose of the governmental action is punishment. *Bell, supra*, 441 U.S., at 539, 99 S.Ct., at 1874. Conditions amount to punishment if they are imposed in such a manner as to cause detainees' to endure genuine privations and hardship over an extended period of time. *Bell supra*, 441 U.S., at 542, 99 S.Ct., at 1875. However, the government has a legitimate interest in ensuring the detainees' presence at trial and the effective management of the detention facility. Conditions of confinement imposed for these purposes do not amount to punishment. *Bell, supra*, 441 U.S., at 540, 99 S.Ct., at 1874, 1875. Cost limitations do not justify Constitutional deprivations. *Estelle v. Ruiz*, 679 F.2d 1115, 1146, (5th Cir. 1982), *Wilson v. Seiter*, __ U.S. ___, ___, 111 S.Ct., 2321, 2326, 115 L.E.2d 271 (1991).

Petitioner was held for over three years on death row in a maximum security unit under conditions equivalent to those imposed for long term and punitive segregation. (Petitioner respectfully draws the Court's attention to the Sentencing Memorandum, Exhibit B, Report of James W.L. Park, Correctional Consultant, and Exhibit C, Report of Jerry J. Enomoto, Federal Monitor). Although charged with non violent offenses, upon which no prior adjudication of guilt had been made, he endured conditions of confinement designed specifically for dangerous prisoners. (Sentencing Memorandum, Exhibit B, Report of James W.L. Park, Correctional Consultant, p. 5).

Sentenced inmates with backgrounds and status similar to petitioner were allowed access to programs and services to which petitioner was denied. (See Exhibit C, Report of Jerry J. Enomoto).

Due to inappropriate classification, petitioner was required to wear a bright orange jump suit which distinguished him from the general prison population and designated him as a violent prisoner with a "shoot to kill" status if found in an unauthorized area. Petitioner soon realized that the guards were extremely sensitive about the orange jump suits, particularly after he learned that one inmate had been shot with buck-shot for refusing to wear the uniform properly. (Sentencing Memorandum, Exhibit A, "A Client Specific Planning Proposal for David Lyle Boese.", p. 16).

Visitations with counsel required the use of chains for movement to the visiting room. Educational and employment opportunities were non existent and condemned prisoners were held in a cell directly across from petitioner's for an entire evening before their executions. Petitioner's daily routine required that he pass by the death chamber itself almost six times a day. The inside of the death chamber, was entirely visible from petitioner's vantage point, as was the injection table. (See Exhibit B, Report of James W.L. Park, Correctional Consultant, Sentencing Memorandum, p. 7, "The execution area being in view of Boese's and Kimball's living quarters and adjacent to their daily pathway out of their housing unit adds substantially to the punitive aspects of [their] trial detention status.")

From his cell he witnessed the emotional last visits of family members and overheard their conversations and prayers. He came in direct contact with the condemned men whenever he used the telephone in the day room. A situation unique to the Nevada prison, since condemned inmates are typically separated from the general population and "since most final visits are conducted well away from the other condemned inmates". (See Exhibit B, Report of James W.L. Park, Correctional Consultant, Sentencing Memorandum, p. 7,)

The psychological impact of the executions on the entire prison population, let alone those in direct contact with the condemned, was so pronounced that prison officials were required to lock down the entire facility for 24 hours before and after the executions. (See Exhibit A, "A Client Specific Planning Proposal for David Lyle Boese," p.16.). The prison offers no counseling programs to work through the fears and emotions that this type of traumatic event has on offenders in a death row prison. (See Exhibit A, "A Client Specific Planning Proposal for David Lyle Boese," p. 16).

Yet the Ninth Circuit made no finding with respect to the government's interest in detaining petitioner under conditions harsher and more punitive than those endured by sentenced prisoners, because they did not involve "core conditions". (See Exhibit B, Report of James W.L. Park, Correctional Consultant, Sentencing Memorandum, p. 5, "The three years plus that David Boese and Robert Kimball have spent in this maximum cell block is far more than any but the most dangerous prisoners would have served under

such conditions.")

Even applying the "core conditions" test, the Ninth Circuit should have found an eighth amendment violation. Prison officials were well aware that the executions produced adverse psychological effects on the general population and the guards. This knowledge can be inferred from the obvious way the executions affected other inmates. One inmate committed suicide by hanging shortly following two executions which occurred within one week of each other in 1989.(Sentencing Memorandum, Exhibit A, "A Client Specific Planning Proposal for David Lyle Boese.", p. 14). The failure to provide adequate counseling, especially to those nearest these gruesome events who were awaiting trial, amounts to deliberate indifference to serious medical needs. *Wilson, supra*, __ U.S. __, 111 S.Ct. 2321, 2327, 115 L.E.2d 271.

Confirmation of the court's confusion about the appropriate standard to apply to pretrial conditions is found in the precedents cited in the opinion below. The court's citation to *Wright v. Rushen*, is misplaced since it involved an eighth amendment challenge to prison conditions by sentenced prisoners. Even in *Wright*, the Court cited no authority for its eighth amendment "core conditions" standard. The Second Circuit's opinion in *Wolfish v. Levi*, 573 F.2d 118, 125, (2nd Cir. 1978), is the only authority that can be found to support such a standard and this Court did not review that portion of the Second Circuit's opinion when it granted certiorari in *Bell, supra*, 441 U.S., at 532, 99 S.Ct., at 1870.

The decision below is also in conflict with the Ninth Circuit's opinion in *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), which found eighth amendment violations where conditions involved sensory deprivation, constriction of space and disqualification from prison vocational and educational programs. *Hoptowit, supra*, 682 F.2d, at 1257.

Equally in conflict with the Ninth Circuit's opinion is the Second Circuit's opinion in *Lareau v. Manson*, 651 F.2d 96 (2nd Cir. 1981), recognizing that overcrowding amounts to punishment if it subjects a detainee over an extended period to genuine privations and hardship not reasonably related to a legitimate governmental objective. *Lareau, supra*, 651 F.2d, at 103. (finding overcrowding violated rights of detainees but sentenced prisoners could be required to endure the conditions for a longer period of time *Lareau, supra* at 108-109). In *Lock v. Jenkins*, 641 F.2d 488, (7th Cir. 1981), the Seventh Circuit distinguished *Wolfish*, and found extended confinement of detainees in small cells violated the Fourteenth Amendment. (Detainees held in 37 square feet of space per inmate for 22 hours daily for period of up to sixty days amounted to punishment in violation of the Fourteenth Amendment, *Lock, supra*, 641 F.2d, at 492-493).

This court has held that the long duration of cruel prison conditions indicates knowledge on the part of prison officials and hence some form of culpability in maintaining such conditions. *Wilson, supra*, __ U.S., at __, 111 S.Ct., at 2325. However, decisional law as developed by the Circuit courts, and detailed above, has clearly required a lesser showing

of intent where Fourteenth Amendment claims are involved. This distinction arises from the substantial difference in the Constitutional interests sought to be protected. *Hurtado v. People of California*, 110 U.S., 516, 536, 4 S.Ct. 111,121, 28 L.E. 239 (1884), (due process refers to certain fundamental rights which our system of jurisprudence has always recognized, "if any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law." quoting *Brown v. Comrs*. 50 Miss, 468.)

Petitioner suffered genuine privations and hardships over an extended period of time as a result of conditions which were imposed for no legitimate purpose. There is no reasonable justification for the extended amount of time, over three years, that petitioner endured on death row. The economic convenience of prison authorities is not sufficient reason to justify denying petitioner a right of such constitutional magnitude as the right to due process. *Estelle v. Ruiz*, 679 F.2d 1115, 1146, (1982), "Constitutional rights are not, of course, confined to those available at moderate cost", *Wilson v. Seiter*, _ U.S. ___, ___, 111 S.Ct., 2321, 2326, 115 L.E.2d 271 (1991).

As the reports from experts submitted on petitioner's behalf show, effective management of the facility required that prison officials minimize, to the extent possible, the adverse psychological effects of the executions on the rest of the population so as to avoid any violent repercussions from these emotional episodes. Effective management of the facility also

required that violent prisoners with long sentences be separated from those, like petitioner, with no history of violence. Such procedures encourage model behavior from those prisoners who have everything to gain from conforming to the rules and make the day to day management of the facility easier. (See Exhibit B, Report of James W.L. Park, Correctional Consultant, Sentencing Memorandum, p. 5,)

The Ninth Circuit has created a confusing precedent, likely to generate even further confusion among the other Circuits. It is a precedent directly in conflict with this Court's ruling in *Bell*. Plenary consideration of the matter by this Court is essential.

II.

The decision below that the Eighth and Fourteenth Amendments afford no remedy for a reduction in sentence where the government imposes punishment prior to conviction raises important and unresolved problems appropriate for decision by this Court.

The Ninth Circuit failed to make a finding with respect to petitioner's due process and eighth amendment claims because the issues are raised on direct appeal of his sentence and the requested relief is a reduction in the term of his sentence.

Decisional law interpreting the eighth and fourteenth amendments as those provisions relate to conditions of confinement has developed as a result of challenges brought by prisoners under 18 U.S.C. §1983, a civil rights statute. The remedies it affords

are both legal and equitable. More drastic remedies, including premature release, are usually only available where prison officials fail to comply with court directives.

The conditions of confinement existing at Nevada State Prison have been the subject of ongoing litigation for many years. A report submitted in the court below, by Dr. Shiela Balkan, Criminologist, details the ongoing problems at the prison. Two stipulated agreements have been reached both stemming from §1983 actions brought by inmates. The first, finalized on August 19, 1983, resulted from a class action filed in *Shapley v. O'Callaghan*, wherein prison officials agreed to improve conditions in the areas of food, clothing, sanitation, developmental programs, safety and building standards. An independent auditor was retained to monitor progress.

Eighteen months after the appointment of the auditor significant problems remained with respect to the lack of psychiatric evaluation of prisoners in administrative segregation. (see, Report of Shiela Balkan, Ph.D., Criminologist, p. 8.) The auditor's report rendered eighteen months after the initial agreement, noted concern about the lack of mental health care the inmate's received and the availability of institutional programs and legal assistance. As is discussed above, these conditions continued to exist throughout petitioner's confinement in the Federal Prisoner Unit. (see, Report of Shiela Balkan, Ph.D., Criminologist, p. 9, 11.)

In 1988, petitioner himself was a member of a class of prisoners involved in a subsequent §1983

action in *Phillips v. Bryan et.al.* in which a federal Court approved a second Stipulated Settlement Agreement. This class was defined as all prisoners who were confined or who would be confined at Nevada State Prison. It resulted in the appointment of federal monitors directed to prepare reports every six months tracking the progress of the prison official's implementation of the terms of the agreement. The agreement was designed to remedy several eighth amendment violations and identified a need to revise classification procedures for assignment of inmates to maximum and close security. Additionally, monitors were directed to review the use of excessive force by correctional officers. (see, Report of Shiela Balkan, Ph.D., Criminologist, p. 9, 11)

Three years after the second stipulated agreement and almost eight years after the first suit challenging the conditions at Nevada State Prison was initiated, federal monitor Jerry J. Enomoto, concluded that the conditions of petitioner's confinement, and those of his co-defendant, were "more confining and punitive than would ordinarily be the case for inmates of their background and status". (Mr. Enomoto also concluded that "Mr. Park's very detailed report presents a generally accurate picture of their situation"), (see, Sentencing Memorandum, Exhibit C, Report of Jerry J. Enomoto) A few months after Mr. Enomoto rendered his report, petitioner was sentenced.

According to the decision of the court below, petitioner's entitlement to relief under the due process clause and the eighth amendment vanished after he was sentenced and removed to another facility. Such

a distinction is arbitrary and unfairly penalizes petitioner for the failure of prison officials to remedy conditions which by all accounts were cruel and unusual and violated petitioner's right to be free punishment in accordance with the decision rendered in *Bell, supra*, 441 U.S. 520, 99 S.Ct. 1861.

Although injunctive relief would have been appropriate at an earlier date, this relief was not provided and petitioner now has no other remedy for the unnecessary suffering he has already endured.

The words of the Fourteenth Amendment were crafted to ensure that governmental authority be exercised in accordance with due process. As Daniel Webster aptly articulated, due process means a law which hears before it condemns, which proceeds on inquiry and renders judgment only after trial. *Wichita Council No. 120 of Security Ben. Ass'n v. Security Ben. Assn.*, 138 Kan. 841, 28 P.2d 976, 980 (Sup.Ct. 1934).

Just as this court has recognized a need to develop unique remedies for Constitutional violations like those involving the fourth amendment, this court has the Constitutional authority and responsibility to provide remedies for hardships endured as a consequence of due process deprivations.

The fact that petitioner presses his argument in this context presents no procedural or other impediment to relief and the Ninth Circuit cites no authority for this proposition.

Lower courts need guidance from this Court as to the applicability of the appropriate relief and

standards where conditions of confinement are alleged to violate specific constitutional guarantees.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If petitioner is correct in urging that the Ninth Circuit must review his claims in light of the appropriate Constitutional standards and relief, the matter should be remanded to the District Court for appropriate disposition, after a full development of the facts concerning the conditions of confinement.

Respectfully submitted,

LAWRENCE P. MANNING

LAWRENCE P. MANNING
LAW OFFICES OF
LAWRENCE P.MANNING
444 Market Street Suite 930
San Francisco, CA 94111
(415) 433-4500
Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	No. 91-10243
Plaintiff-Appellee,	)	D.C. No. CR-87-00055-HDM
v.	)	
DAVID LYLE BOESE,	)	MEMORANDUM*
Defendant-Appellant.	)	

On Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Submitted June 11, 1992[**]
San Francisco, California

Before: GOODWIN, SCHOEDER, and BEEZER,
Circuit Judges

This case addresses a convicted defendant's rights to a sentence proportionate to his crime and for additional credit for time served under extreme conditions. Based upon David Boese's plea of guilty to interstate travel in aid of racketeering, see 18 U.S.C. § 1952, and money laundering, see id. § 1956, the district court sentenced him to consecutive prison terms of 3 and 19 years. We have jurisdiction and we affirm.

Boese played a leading role in a scheme to import 42 tons of marijuana from Thailand and to launder the profits through a casino in Nevada. Federal agents infiltrated the scheme and arrested the participants. Boese admitted his involvement in the scheme and assisted the government in recovering in excess of $2,100,000 in ill-gotten gains.

Boese entered into two related plea agreements. Under both agreement, $7,618,570 of cash that the participants attempted to launder was forfeited. Under the first agreement, the participants agreed to disgorge an additional $7,000,000 of ill-gotten gains in exchange for maximum sentences of, in Boese's case,

---

6[**] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P.34(a); Ninth Cir. R. 34-4.

3 and 10 years.[1/] Under the related supplemental agreement, which arose because the participants either could not or chose not to disgorge the $7,000,000 of ill-gotten gains, Boese agreed to disgorge in excess of $2,100,000. The three year interstate travel in aid of racketeering cap remained, but the limitation on the money laundering count was removed. The district court accepted Boese's guilty plea under the related supplemental agreement.

Boese has a history of criminal convictions, which include car theft and cocaine distribution. At the time of his arrest, Boese was wanted for failing to appear to serve an 18 year sentence on the cocaine distribution conviction. The district court considered Boese's criminal history, his participation in the scheme, the complexity of the scheme and Boese's subsequent cooperation, and sentenced Boese to consecutive terms of 3 years for interstate travel in aid of racketeering and 19 years for money laundering. The consecutive sentences run concurrently with the 18 year cocaine distribution sentence. Boese received 1258 days of credit against his consecutive sentences for time served while awaiting judgement and sentencing.

Boese was confined in a maximum security prison while awaiting judgement and sentencing. The unit he occupied houses death row inmates for the last few hours before their executions. Three executions occurred during Boese's incarceration and

---

[1/] Boese was sentenced under pre-guidelines rules. The maximum for interstate travel in aid of racketeering is 5 years, § 1952, and the maximum for money laundering is 20 years. § 1956.

two were stayed shortly before being carried out. Boese's cell covered 48 square feet. Due to his status as an ethnic minority,[2/] Boese claims that he constantly feared for his life.

We review sentencing decisions for abuse of discretion. Generally a district court does not abuse its discretion when it imposes a sentence within statutory limits. Constitutional concerns allow us to review a sentence that falls within statutory limits. United States v. Meyers, 847 F. 2d 1408, 1416 (9th Cir. 1988). Except for the determination of underlying historical facts, which we always review for clear error, constitutional issues generally receive de novo review. United States v. McConney, 728 F. 2d 1195, 1200, 1204 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

Boese argues that his sentence is unconstitutionally disproportionate to his crimes. Boese invites us to apply Solem v. Helm, 463 U.S. 277 (1983), to his case. The correct standards for Boese's appeal are found not there, however, but in Justice Kennedy's concurrence in Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (Kennedy, J., concurring). See United States v. Van Winrow, 951 F. 2d 1069, 1071 & n.2 (9th Cir. 1991) (citing and quoting Marks v. United States, 430 U.S. 188, 193 (1977) (fragmented Court's holding is narrowest ground supporting judgment)).

In Harmelin, Justice Kennedy addresses the power of Michigan's legislature to mandate a life sentence without parole for possession of more than

---

[2/]The prison primarily houses Mariel Cubans. Boese is a caucasian.

650 grams of cocaine. He explains that the eighth amendment does not require strict proportionality; it forbids gross disproportionality. Harmelin, 111 S. Ct. at 2705 (Kennedy, J. concurring). "[I]ntra and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Id. at 2707. The Court's "Eighth Amendment capital decisions reject any requirement of individualized sentencing in noncapital cases."Id.

Boese does not contend that the maximum sentences authorized by statute are disproportionate. He complains instead that his individual sentence is disproportionate. Justice Kennedy specifically observed that a far more severe sentence -- 40 years -- for a crime far less serious than Boese's--possession with intent to distribute nine ounces of marijuana--was not disproportionate. Id. at 2706 (citing Hutto v. Davis, 454 U.S. 370 (1982)). We conclude that Boese's sentence is not disproportionate in violation of the eighth amendment.

Boese contends that the district court unfairly penalized him by sentencing him under the supplemental plea agreement when the participants could not come up with the $7,000,000 required by the first plea agreement. Boese does not maintain that he complied with the first plea agreement. To be valid, a guilty plea "'not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences.' " Haring v. Prosise, 462 U.S. 306, 319 (1983) (quoting Brady v. United States, 397 U.S 742, 748 (1970)). Boese does not argue, and the sentencing transcript does not support, that his assent to the

supplemental plea agreement was anything but voluntary, knowing and intelligent. We conclude that the district court did not abuse its discretion by sentencing Boese to terms specifically authorized by a valid plea agreement.

Boese argues that his two sentences should run concurrently, not consecutively. His argument posits that the district court did not properly consider the factors set forth in 18 U.S.C. § 3553 (a). A fair reading of the transcript belies this contention. The district court thought long and hard about Boese's sentence, and whether his terms should run concurrently or consecutively. We conclude that the district court did not abuse its discretion by imposing sentences that were authorized both by statute and by Boese's plea agreement. See Meyers, 847 F.2d at 1416.

Boese asserts that his detention in a cell unit in which Nevada executes it capital convicts violates both due process and the eighth amendment. He seeks to lever these violations into an enhanced sentence reduction by applying a multiplier to the credit the district court gave him for time served.

Nonpunitive pretrial detention occurs in a wide variety of facilities. Bell v. Wolfish, 441 U.S. 520, 537 (1979). Once lawfully incarcerated, a detainee must accept limitations on his rights and privileges. Id. at 545-46. The government has the right to enforce administrative measures in its detention facilities to ensure order and security and to exclude contraband. Id. at 540.

Due process requires an adjudication of guilt before punishment. Id. at 535. Pretrial detention becomes punishment "if a restriction or condition is not reasonably related to a legitimate goal--if it is

arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." Id. at 539.

Boese correctly observes that the eighth amendment requires that his conditions of incarceration comport with evolving standards of decency. Wright v. Rushen, 642 F. 2d 1129, 1133 (9th Cir. 1981). Those standards focus, however, on "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Id. at 1132-33.

Most of Boese's complaints about the conditions of his detention come with the territory. In fact, in Bell the Court specifically held that two people could be detained in 75 square feet of space. 441 U.S. at 541-42. Boese was detained alone in 48 square feet. Although Boese feared for his safety, he does not maintain that prison officials willfully subjected him to risk of bodily harm. Cf. Davidson v. Cannon, 474 U.S. 344, 347 (1986) (section 1983 action requires more than mere negligence).

The gravamen of Boese's argument is his proximity to Nevada's facility for executing capital convicts ("death row"). In Bell, certain deprivations were permissible because of the brevity of detention. 441 U.S. at 543, 552. Boese was detained on death row for three and a half years.

We need not reach the question whether Boese's conditions of detention violated either the due process clause or the eighth amendment. Even if Boese's pretrial detention was punishment, the context within which he presses his argument requires its rejection. Other than a military case involving overseas incarceration, Boese offers no authority for the novel proposition that we should

reverse the district court's exercise of discretion in sentencing and award Boese additional credit for time served.

Boese should have objected to his incarceration on Nevada's death row via habeas petition during that incarceration. As we observed supra, Boese received credit for time served. By failing timely to object, he waived his right to a hearing on the conditions of his confinement.

As well, any of Boese's concerns about his 18 year cocaine distribution sentence should be the subject of a habeas petition.

The district court's sentence of Boese to consecutive terms of 3 and 19 years with credit for time served is AFFIRMED.

APPENDIX B

United States District Court

District of NEVADA

UNITED STATES OF AMERICA
V.
DAVID LYLE BOESE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November 1, 1987)

Case Number :
CR-N-87-55-HDM

David Chesnoff
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) 1 and 2 of Information filed January 13, 1990
☐ was found guilty on count(s)_____after a plea of not guilty.

Accordingly, the defendant is adjudged of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offenses Concluded	Count Number(s)
18:1956 (a) (2) (B) (i); 2	International Money Laundering; Aiding and Abetting	October 1987	1

18:1952 (a) (3) & 2	Interstate Travel in Aid of Racketeering / Aiding and Abetting	October 22, 1987	2

☐ The defendant has been found guilty on count(s) _____ and is discharged as to such count(s).

☐ The Indictment filed Nov. 18, 1987, and Counts 1 thru 13 and 15 of the Superseding Indictment (is) (are) dismissed on the motion of the United States.

IT IS THE JUDGMENT OF THE COURT THAT: As to count 1 of the information, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of nineteen (19) years. As to Count 2 of the Information, defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty-six (36) months. Imprisonment as to Counts 1 and 2 shall run consecutive to each other and concurrent with the sentence imposed in case No. CR-4-80-125 in the Northern District of Texas at Fort Worth. Defendant shall receive credit for time served (1,258 days).